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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

DUQUESNE LIGHT COMPANY, OHIO POWER COMPANY, WEST PENN POWER COMPANY, APPALACHIAN POWER COMPANY, MONONGAHELA POWER COMPANY, THE POTOMAC EDISON COMPANY, AND VIRGINIA ELECTRIC AND POWER COMPANY,

Petitioners,

v.

STATE TAX DEPARTMENT OF WEST VIRGINIA AND HERSCHEL H. ROSE, III, STATE TAX COMMISSIONER OF WEST VIRGINIA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

On March 11, 1978, the West Virginia Legislature enacted Enrolled Committee Substitute for Senate Bill No. 163, Chapter 96, Acts of the Legislature, Regular Session, 1978, amending and reenacting certain sections of the State's Business and Occupation Tax embodied in Chapter 11, Article 13, of the West Virginia Code of 1931, as amended, and adding a new section to the statute and further amending and reenacting W. Va. Code § 11-13C-2 relating to Business and Occupation Tax credit for industrial expansion.

Summarized briefly, the amendments of 1978, hereinafter referred to as the 1978 Act, involved the following

sections of the Business and Occupation Tax statute:

(a) Code 11-13-2. This section imposes the Business and Occupation Tax and is the provision of the 1978 Act on or with respect to the generation or transmission of electric power which prescribes the measure of the tax to be paid by persons generating electricity in West Virginia which is transmitted for sale in other states.

(b) Code 11-13-2b. This section prescribes the rate of tax to be paid by persons engaged within the State in the business of manufacturing, except the generation of electricity. The 1978 amendments removed persons engaged in the business of generating electricity from taxation under this section.

(c) Code 11-13-2d. This section prescribes the rate of tax to be paid by persons engaged within the State in the business of a public utility. Since the bulk of the domestic sales of electric power in West Virginia is made by public utilities, Code 11-13-2d is the principal provision of the 1978 Act on or with respect to the generation or transmission of electricity for sale within the State. The 1978 amendments lowered the tax rates prescribed to be paid by electric utilities and created a new tax category for nongenerating electric utilities.

(d) Code 11-13-2k. This section prescribes the rate of tax to be paid by persons engaged within the State in the banking and financial business.

(e) Code 11-13-2m. This was the new section added to the Business and Occupation Tax Statute by the 1978 Act, prescribing the rate of tax to be paid by persons engaged within the State in the business of generating electric power for sale, profit, or commercial use which is not subject to taxation under Code 11-13-2d, the public utility classification. Since the bulk of electric power subject to taxation under Code 11-13-2m is transmitted for sale in other states, Code 11-13-2m is the provision of the 1978 Act on or with respect to the generation or transmission of electricity for sale outside West Virginia.

(f) Code 11-13-3b. This section defines the phrase "normal tax" and prescribes the method of computing "normal tax."

(g) Code 11-13-25. This section limits the rates of the Business and Occupation Tax which municipalities may impose.

The amendment to the statute pertaining to the Business and Occupation Tax credit for industrial expansion contained in the 1978 Act involved Code 11-13C-2, wherein the definition of the term "industrial taxpayer" was expanded to include persons engaged in the business of producing electric power.

As indicated above, the 1978 Act is not simply a statute pertaining solely to electric power. It is actually a congeries of measures involving West Virginia's Business and Occupation Tax.

The provisions of the 1978 Act raised by the Petition are Code 11-13-2; Code 11-13-2d; and Code 11-13-2m.

The Petitioners have singled out Code 11-13-2m as the focal point of their attack on the 1978 Act. Code 11-13-2m prescribes the rate of tax to be paid by persons engaged in this State in the business of generating electric power which is not subject to taxation under Code 11-13-2d, the public utility classification. This exclusionary provision in Code 11-13-2m, Petitioners charge, renders the 1978 Act violative of the Tax Reform Act of 1976, Section 2121(a), 90 Stat. 1914, codified at 15 U.S.C. § 391, also embodied in 15 U.S.C.A. § 391, hereinafter referred to sometimes as Section 391. However, Code 11-13-2 is of especial significance to the case at bar. Not only does this part of the 1978 Act impose the West Virginia Business and Occupation Tax, but it

prescribes as the measure of the tax to be paid by persons engaged in this State in the business of manufacturing, including the generation of electricity, whose goods are transported outside West Virginia prior to sale, the value of such products immediately before shipment to other states. In contrast to this measure, Code 11-13-2d, also a part of the 1978 Act, prescribes that the measure of the tax to be paid by any person generating electric power within West Virginia which he sells domestically as a public utility is the gross proceeds of the sale.

The difference in the measure of the tax prescribed by the 1978 Act, with respect to electric power generated in West Virginia which is sold domestically and that which is transported outside

the State, has a profound effect on the amount of tax to be paid by the ultimate consumer, and is the key to understanding the case at bar.

Included in the gross receipts measure of the tax prescribed by Code 11-13-2d are all costs attendant upon the generation and delivery of the product within this State. The tax prescribed by Code 11-13-2d, measured by gross receipts of sale, is passed on to be paid ultimately by their West Virginia customers in the form of rates by companies engaged in the public utility business within the State. However, in the case of companies subject to the tax under Code 11-13-2m generating electricity which is transmitted outside the State the measure of the tax is limited by Code 11-13-2 to the value of such

electricity in West Virginia immediately prior to transmission outside the State. Thus, transportation, distribution, and other costs of electricity generated in West Virginia and transported outside the State are excluded from the measure of the tax prescribed by Code 11-13-2m, which tax is passed on by the generating companies to their out-of-State customers.

The applicable federal statute, Section 391, forbids the imposition of a state tax on or with respect to the generation or transmission of electricity which results either directly or indirectly in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

When the 1978 Act is analyzed in terms of Section 391, it is clear that electricity taxed according to its value in West Virginia prior to transportation outside the State bears a lower tax burden than does electricity taxed according to the gross receipts of sale within the State.

A tax measured by the value of electricity in West Virginia prior to transportation outside the State (Code 11-13-2m; Code 11-13-2) paid by out-of-State consumers of electricity generated in West Virginia results in a lesser tax burden to such consumers than does a tax measured by the gross receipts of sale of electricity generated in the State (Code 11-13-2d) paid by West Virginia customers of public utilities.

Respondents submit, therefore, that insofar as the cost of electric power generated in West Virginia is influenced by the 1978 Act, the difference in the respective measures of the tax prescribed by Code 11-13-2d and Code 11-13-2m insures that the out-of-State consumers pay much less for West Virginia-generated electric power than do their counterparts within the State.

INACCURACIES CONTAINED IN PETITIONERS' STATEMENT OF THE CASE

Petitioners allege in their Statement of the Case that Code 11-13-2m "discriminates against out-of-State consumers because the tax applies only to West Virginia generation or manufacture which is transmitted out of State." (Petition, p. 3.)

By its express terms, Code 11-13-2m is not limited in its application to electricity generated in West Virginia which is transmitted to other states. Code 11-13-2m provides that the measure of the tax shall be the value of all electric power generated within the State for sale, profit, or commercial use regardless of the place of sale or the fact that transmission may be to points outside the State. The only exclusions from taxation contained in Code 11-13-2m are electricity subject to taxation under Code 11-13-2d and electricity produced by municipally owned power plants.

Accordingly, the non-utility sale in West Virginia by the producer of electric power generated by him in this State is subject to taxation under Code

11-13-2m upon the gross proceeds of the sale. Although the bulk of the electric power generated in West Virginia by Petitioners is transmitted for sale outside the State, this provision of Code 11-13-2m would be applicable to any in-State non-utility sale of its West Virginia-generated electricity made by any of the Petitioners.

Petitioners further allege in their Statement of the Case that the West Virginia Supreme Court of Appeals "observed that, when read in isolation, the tax imposed by West Virginia Code 11-13-2m upon those engaged in the business of generating or producing electric power 'is patently discriminatory under Snead because it taxes only the manufacturing of electricity which is transmitted out of State, and excludes in-State

manufacturing by its reference to Section 2d.'" (Emphasis in original.) (Petition, p. 5.)

Respondents submit that this quotation from the State Court's opinion is taken out of context. The full statement of the Court is as follows:

> "The principal argument advanced by the utilities is that Section 2m must be read in isolation. When it is, it is patently discriminatory under Snead because it taxes only the manufacturing of electricity which is transmitted out of state, and excludes in-state manufacturing by its reference to Section 2d.
>
> "We are cited several cases in which we have held that our business and occupation tax is composed of a number of separate taxes which are applicable to various distinct business activities. E.g., Virginia Elec. and Power Co. v. Haden, supra; United Fuel Gas Co. v. Battle, 153 W. Va. 222, 167 S.E.2d 890, appeal dismissed sub nom. United Fuel Gas Co. v. Haden, 396 U.S. 116, 24 L. Ed. 2d

> 309, 90 S. Ct. 398 (1969); Owens-Illinois Glass Co. v. Battle, 151 W. Va. 655, 154 S.E.2d 854 (1967). Based upon these cases, the argument is made that each section of the business and occupation tax must stand scrutiny separately." See Appendix, Part A, pp. a16-a18.

When these remarks are fairly read in their complete context, it is clear that rather than rendering a pronouncement as to the validity or invalidity of Code 11-13-2m at that point in the opinion, as Petitioners contend, the West Virginia Court was merely summarizing the principal argument advanced by Petitioners before the Court (and before this Court) in support of their claim that Code 11-13-2m is invalid, viz: that it must be viewed in isolation from the rest of the 1978 Act. This view is further supported by the Court's additional observation:

> "The fundamental fallacy of the appellees' argument is that they would have us limit our analysis to Section 2m, as if the legislative amendments in 1978 involved only this section." See Appendix, Part A, p. a20-a21.

Based upon their faulty reading of the opinion, the Petitioners suggest at p. 5 of the Petition that the West Virginia Supreme Court of Appeals rendered a judgment that Code 11-13-2m was invalid, but upheld the statute nevertheless. Respondents submit that the passages quoted above from the State Court's opinion of their own force refute Petitioners' inference.

SUMMARY OF ARGUMENT

Unlike the New Mexico Electrical Energy Tax Act invalidated as violative of Title 15 U.S.C. § 391 by this Court in Arizona Public Service Company v. Snead, 441 U.S. 141, 60 L. Ed. 2d 106,

99 S. Ct. 1629 (1979), West Virginia has placed its statutes relating to the electric power business conducted within the State in several sections of the Business and Occupation Tax statute.

Under the settled practice of the West Virginia Supreme Court of Appeals, the various sections of the Business and Occupation Tax statute are considered in pari materia. The provisions on or with respect to the generation or transmission of electricity within the State are Code 11-13-2, Code 11-13-2d, and Code 11-13-2m, herein referred to collectively as the 1978 Act.

Code 11-13-2d is the provision of the 1978 Act on or with respect to the generation or transmission of electricity for sale by public utilities within the State, prescribing a rate of 4

percent of tax on the gross proceeds of sale. The bulk of the electric power sold in West Virginia is subject to taxation under Code 11-13-2d, which is the principal taxing section of the 1978 Act on or with respect to the generation or transmission of electric power for sale in West Virginia. Code 11-13-2m also pertains to the generation and sale of electricity in West Virginia but excludes generated electricity, the sale of which is subject to taxation under Code 11-13-2d. The bulk of the electric power subject to taxation under Code 11-13-2m is transmitted for sale in other states, and this section is the provision of the 1978 Act on or with respect to the generation or transmission of electricity which is sold outside West Virginia. Through the mechanism of Code

11-13-2, the measure of the tax under Code 11-13-2m on generated electricity to be sold in other states is limited to its value immediately before shipment outside West Virginia. The tax on electricity subject to taxation under Code 11-13-2m is computed at the rate of 4 percent of the value thereof immediately prior to transmission outside the State.

A tax computed on 4 percent of the value of electricity in West Virginia prior to transportation outside the State in interstate commerce (Code 11-13-2m; Code 11-13-2), paid by out-of-State consumers of electricity generated in the State, results in a lesser tax burden to such consumers than does a tax computed on 4 percent of the gross receipts of sale in intrastate commerce of electricity generated in the State (Code

11-13-2d) paid by West Virginia consumers.

The federal statute involved, 15 U.S.C. § 391, herein sometimes referred to as Section 391, forbids the imposition of a state tax on or with respect to the generation or transmission of electric power which results either directly or indirectly in a greater tax burden on electricity generated or transmitted in interstate commerce than on electricity generated or transmitted in intrastate commerce. The New Mexico Electrical Energy Tax Act was held violative of Section 391 in Snead.

The West Virginia statutes on or with respect to the generation or transmission of electric power within the State, as construed by her highest Court

in the decision complained of, are in full compliance with Section 391.

In ruling that the 1978 Act does not violate Section 391, the essential point made by the West Virginia Supreme Court of Appeals is that Code 11-13-2, Code 11-13-2d, and Code 11-13-2m are all measures on or with respect to the generation or transmission of electric power in the State. The New Mexico Electrical Energy Tax Act was limited to the single act of generating electricity to be sold outside the State. West Virginia's 1978 Act, on the other hand, reaches beyond the single act of producing electricity to the sharing of the tax burden on or with respect to the generation or transmission of electric power in this State between our citizens and out-of-State consumers. As this State's High Court

indicated, the 1978 Act embraces the entire process. Accordingly, any comparison between the New Mexico Electrical Energy Tax Act and West Virginia's 1978 Act discloses the salient fact that, under the New Mexico statute, the tax on or with respect to the generation or transmission of electric power was borne exclusively by out-of-State consumers, while under the 1978 Act, taxation is shared between domestic and out-of-State consumers, the greater part of which burden is borne by West Virginians.

Since West Virginia's 1978 Act and the New Mexico Electrical Energy Tax Act condemned in Snead clearly are not comparable statutes, and the tax burden occasioned on or with respect to the generation or transmission of electricity in West Virginia being greater on

domestic consumers than on out-of-State users of such electricity, no basis exists for invalidating the 1978 Act either under Section 391, as interpreted by this Court in Snead, or under the Snead opinion itself.

The foregoing reasoning applies to the claims advanced by the Petitioners that the 1978 Act is discriminatory under the Commerce Clause. Further, the decision of this Court in Armco Inc. v. Hardesty, ___ U.S. ___, 81 L. Ed. 2d 540, 104 S. Ct. 2620 (1984), does not aid Petitioners' claim of Commerce Clause discrimination for the reason that each of the Petitioners is an in-State manufacturer of electric power subjected to the same tax burden measured precisely according to the business activities which each conducts within West Virginia.

Another important reason to deny certiorari review is the lack of finality of the opinion below. The opinion did not decide Petitioners' constitutional challenge to the tax, but remanded the litigation to the trial court to allow it to determine whether the tax violates the Commerce and Equal Protection Clauses of the United States Constitution. The continued pendency of substantial and potentially dispositive federal questions in the lower courts precludes review at this time under traditional or expanded concepts of finality. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 43 L. Ed. 2d 328, 95 S. Ct. 1029 (1975). In fact, the instant Petition (at page 8) assures this Court that, should it decline review at this time, both the resolved statutory question and the unresolved

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constitutional questions, will be presented again at the conclusion of the State litigation. Denying review at this time will thus prevent piecemeal litigation without prejudicing Petitioners' right to seek review at a later date.

ARGUMENT

1. THE FEDERAL STATUTE

The federal statute involved, Title 15 U.S.C. § 391, forbids the imposition of a state tax on or with respect to the generation or transmission of electric power which results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

2. NEITHER THE 1978 ACT NOR ITS APPLICATION BY THE WEST VIRGINIA SUPREME COURT OF APPEALS IS VIOLATIVE OF TITLE 15 U.S.C. § 391.

The Petitioners allege that the West Virginia Legislature, in the 1978 Act, has frustrated congressional policy expressed in Section 391 by imposing a greater tax burden on electricity generated and transmitted in interstate commerce than is imposed on electricity which is generated and transmitted in intrastate commerce, which frustration has been augmented by the majority and concurring opinions issued by the West Virginia Supreme Court of Appeals. These opinions comprise the Appendix to Respondents' Brief, Part A being the majority opinion, pp. a1 through a23, inclusive, and Part B being the concurring opinion, pp. a24 through a37, inclusive.

The linchpin of Petitioners' case in the Court below and before this Court is their insistence that the only portion of the 1978 Act having any connection with the imposition of a tax on or with respect to the generation or transmission of electric power is Code 11-13-2m. They strain to uphold this position in order to bring the case within the ambit of Arizona Public Service Company v. Snead, 441 U.S. 141, 60 L. Ed. 2d 106, 99 S. Ct. 1629 (1979).

In Snead, this Court struck down, as violative of Section 391, the State of New Mexico's Electrical Energy Tax Act, Chapter 263, Laws 1975, Sections 72-34-1 to 72-34-6 NM Stat. Ann. 1953 (repealed). This statute imposed a 2 percent tax on any person generating electricity within the state on each

kilowatt hour produced, whether the sale took place within or without New Mexico, but provided for a credit on the amount of Electrical Energy Tax against the state's separate gross receipts tax of 4 percent due from the generating company upon the retail sale of such electricity within the state. The result was that when all or most of a generating company's product was sold in New Mexico, it incurred no Electrical Energy Tax because of the credit on the separate gross receipts tax on sales, while a generating company selling all of its electric power in other states and consequently incurring no gross receipts tax liability in New Mexico was burdened with the Electrical Energy Tax.

The Snead Court rejected New Mexico's argument that the determination

of the question of whether the Electrical Energy Tax Act imposed a greater burden on generated electricity sent out of New Mexico than was consumed in-state required an examination of the state's total tax structure on the ground that Section 391 "is directed specifically at a state tax 'on or with respect to the generation or transmission of electricity,' not to the entire tax structure of the State" and that to "look narrowly to the type of tax the federal statute names" rather than to the entire state tax structure "is to be faithful not only to the language of that statute but also to the expressed intent of Congress in enacting it." 60 L. Ed. 2d 113.

Because they have fashioned their case upon this language, Petitioners are compelled to argue that the only portion

of the 1978 Act which pertains to the generation or transmission of electric power in West Virginia is Code 11-13-2m.

However, unlike New Mexico, West Virginia has not confined the taxation of the electric power business to a single statute embodied in Code 11-13-2m. In ruling that the 1978 Act does not violate Section 391, the essential point made by the West Virginia Supreme Court of Appeals is that Code 11-13-2; Code 11-13-2d, and Code 11-13-2m are all measures on or with respect to the generation or transmission of electric power. See Appendix, Part A, pp. a18-a19:

> "Moreover, we cannot ignore the fact that the 1978 amendments did more than enact Section 2m. As we have previously stated, several sections of the business and occupation tax which dealt with the manufacturing of electricity were amended. Under well known canons of

statutory construction, we are obliged to consider a legislative enactment in its entirety. [Citations omitted]

"If we consider the 1978 amendments in their entirety, it is apparent that the legislature did not single out and tax only the manufacturing of electricity that is transmitted out of state. Under Section 2d, the manufacturing of electricity that is used in this State is also taxed at the same rate."

and at p. a20:

"In the present case, the 1978 amendments embody both Sections 2d and 2m. It is clear that both sections tax the business of generating electric power at the same rates. It is also clear that Section 2d deals with in-state generation and sale while Section 2m relates only to in-state generation or manufacture which is transmitted out of state. We find no discrimination between Sections 2d and 2m."

Referring to the Electrical Energy Tax Act under consideration in Snead, the West Virginia Court observed that

New Mexico had enacted a single tax statute directed at manufacturing electricity transmitted out of state, which statute Congress declared to be discriminatory. Appendix, Part A, pp. a5, a7, a19, a20. In contrast to the New Mexico statute, Code 11-13-2m was enacted in 1978 as part of a larger plan to reorganize the Business and Occupation Tax on utilities. Appendix, Part A, pp. a8, a9.

Of paramount importance in any comparison between the New Mexico Electrical Energy Tax Act and West Virginia's 1978 Act is the mechanism of Code 11-13-2 which limits the measure of the tax prescribed by Code 11-13-2m on electricity generated in West Virginia and transmitted to other states to its value immediately before transportation. Domestic

consumers of West Virginia-generated electric power, on the other hand, must bear the much larger tax burden of gross receipts of sale by way of Code 11-13-2d, which measure includes all costs of generation and delivery of the product in this State. Appendix, Part A, n.9, p. a16.

As explained in the concurring opinion, the difference between the New Mexico Electrical Energy Tax Act and West Virginia's 1978 Act:

> "relates to the fact that West Virginia producers and distributors of electricity are not exempt from the burden of W. Va. Code, 11-13-2m [1978] but, rather, are subjected to exactly the same burden plus the additional tax on transmission and distribution provided in W. Va. Code, 11-13-2d [1978]." (Emphasis supplied) See Appendix, Part B, pp. a36, a37.

Accordingly, any comparison between the New Mexico Electrical Energy Tax Act and West Virginia's 1978 Act discloses the salient fact that under the New Mexico statute the tax on or with respect to the generation or transmission of electric power was borne exclusively by out-of-State consumers while, under the 1978 Act, taxation is shared between domestic and out-of-State consumers, the greater part of which burden is borne by West Virginians.

Petitioners argue, in substance, that under Snead the West Virginia Court cannot take into consideration that portions of the 1978 Act other than Code 11-13-2m are taxes on or with respect to the generation or transmission of electric power within the meaning of Section 391.

Petitioners' view of the Snead opinion is contrary to the settled decisions of this Court. See, Henniford v. Silas Mason Co., 300 U.S. 577, 81 L. Ed. 814, 37 S. Ct. 524 (1937) at 81 L. Ed. 819:

> "'There is no demand in . . . [the] Constitution that the State shall put its requirements in any one statute. It may distribute them as it sees fit, if the result, taken in its totality, is within the State's constitutional power.'"

See also, Gregg Dyeing Co. v. Query, 286 U.S. 472, 76 L. Ed. 1232, 52 S. Ct. 631 (1932) at 76 L. Ed. 1238:

> "When the Supreme Court of the State has held that two or more statutes must be taken together, we accept that conclusion as if written into the statutes themselves."

The West Virginia Court has traditionally considered the various provisions of the State's Business and Occupation Tax in pari materia.

Appendix, Part A, p. a18. In characterizing Code 11-13-2m as part of a larger plan to reorganize the Business and Occupation Tax on utilities, and in the further characterization of Code 11-13-2, Code 11-13-2d, and Code 11-13-2m as tax measures on or with respect to the generation or transmission of electric power in this State, West Virginia's High Court was following its settled construction of the Business and Occupation Tax statute.

Petitioners maintain that Code 11-13-2d, because it encompasses both the generation and sale of electric power within the State, is not a statute on or with respect to the generation or transmission of electricity within the meaning of Section 391; that the only West Virginia statute on or with respect to

the generation or transmission of electric power is Code 11-13-2m. In this connection, it is again pointed out that Code 11-13-2m encompasses both the generation and sale of electric power in West Virginia when such sale, made by the producer, is not subject to taxation under Code 11-13-2d. From Petitioners' erroneous premise flows their next contention that Code 11-13-2d and Code 11-13-2m do not include equivalent events and therefore do not impose equivalent tax burdens on domestic and out-of-State users of electricity produced in this State. Thus Petitioners argue that the West Virginia Supreme Court of Appeals, in rendering the decision below, considered the entire tax structure of the State, contrary to Snead and adjudged the taxes prescribed by Code 11-13-2d

and Code 11-13-2m to be equivalent burdens.

Respondents submit that, Petitioners' arguments notwithstanding, the West Virginia Supreme Court of Appeals was concerned with the policy of Congress expressed in Section 391, forbidding state taxes on or with respect to the generation or transmission of electricity which impose a greater burden on interstate commerce than on intrastate commerce. Manifestly, the congressional purpose was directed at equivalent tax burdens, not equivalent tax events. The majority and concurring opinions of the State Court clearly demonstrate that the construction of the 1978 Act, with reference to Code 11-13-2, Code 11-13-2d, and Code 11-13-2m did not involve West Virginia's entire tax structure. The

Business and Occupation Tax is only one part of the State's tax structure, albeit an extremely important one.

Moreover, the West Virginia Court most emphatically did not hold that Code 11-13-2d and Code 11-13-2m prescribe equivalent tax burdens. The ruling of the Court was that Code 11-13-2, Code 11-13-2d, and Code 11-13-2m are all tax measures on or with respect to the generation or transmission of electric power and that the differentiation prescribed by Code 11-13-2 of the measure of the respective taxes to be paid by in-State and out-of-State consumers of West Virginia-generated electric power means that, in terms of Section 391, the greater economic burden of the tax prescribed by the 1978 Act is borne by West

Virginia consumers than by out-of-State consumers.

Petitioners have bound themselves to the theory that Code 11-13-2m is the only West Virginia statute on or with respect to the generation or transmission of electric power and, as such, must be isolated from the rest of the 1978 Act. When this separation is accomplished, Petitioners maintain, Code 11-13-2m is akin to the New Mexico Electrical Energy Tax Act. In their attack on the decision of the West Virginia High Court they ask that this Court adopt their theory.

The 1978 Act of West Virginia and the New Mexico Electrical Energy Tax Act are not, however, comparable statutes. The Respondents submit that the 1978 Act, being particularly advantageous to

interstate commerce over intrastate commerce, comports fully with the congressional design expressed in Section 391, and any resemblance between any portion of the 1978 Act and the New Mexico statute interdicted by Congress and by this Court in Snead is purely superficial.

3. THERE IS NO CONFLICT BETWEEN THE DECISION OF THE WEST VIRGINIA SUPREME COURT OF APPEALS AND ARIZONA PUBLIC SERVICE COMPANY v. SNEAD, 441 U.S. 141, 60 L. Ed. 2d 106, 99 S. Ct. 1629 (1979).

Petitioners accuse the West Virginia High Court of deciding the case at bar in direct conflict with Arizona Public Service Company v. Snead, 441 U.S. 141, 60 L. Ed. 2d 106, 99 S. Ct. 1629 (1979). In support of this thesis, Petitioners argue that there is no material difference between the credit mechanism of the New Mexico Electrical Energy Tax Act

struck down in Snead and the exclusion from the measure of the tax prescribed by Code 11-13-2m of electricity subject to taxation under Code 11-13-2d. (Petition, pp. 12, 13.)

However, this Court in Snead recognized that West Virginia has not adopted the interdicted taxing scheme of New Mexico. See, 60 L. Ed. 2d 113, n.7:

> "The amici in this case have pointed to several similar state taxes on the generation of electricity. Pa Stat Ann, Tit 72, § 8101 (Purdon Supp 1978-1979); Wash Rev Code §§ 82.16.020, 82.16.050 (1976); W Va Code §§ 11-13-2d, 11-13-2m (Supp 1978). None of these States, however, has adopted precisely the scheme used by New Mexico, and we express no opinion as to the validity of these or any other state tax laws." (Emphasis supplied) See Appendix, Part A, p. a8.

The Snead Court further recognized that Section 391 was aimed directly at

the New Mexico Electrical Energy Tax Act. 60 L. Ed. 2d 112. Section 391 is not intended to prohibit, restrain or burden any other State which currently imposes a nondiscriminatory tax on the generation of electricity. U.S. Code Cong. & Ad. News, 3865 at 3866, 94th Cong., 2d Sess. [1976].

Petitioners further maintain that the West Virginia system of taxing the electricity business does not impose an evenhanded tax on in-State and out-of-State consumers of electric power produced in the State as required by Section 391 and by Snead. (Petition, p. 14.)

The evenhandedness contemplated in Section 391 is described in Snead, 60 L. Ed. 2d 114:

> "Congress required only that New Mexico, if it chooses to tax the generation of electricity for consumption in

> either city [Phoenix or Albuquerque], tax it equally for each." (Bracketed material and emphasis supplied)

Respondents submit that Code 11-13-2m, although it does not include within its measure electricity generated in this State which is subject to tax under Code 11-13-2d, is, nevertheless, an example of the evenhanded tax contemplated by Congress in Section 391 and by this Court in Snead. For the reason that the measure of the tax prescribed to be paid by domestic consumers of electricity generated in this State (4 percent of gross receipts of sales, Code 11-13-2d) is so much larger than the measure of the tax prescribed to be paid on electricity generated in West Virginia which is transmitted outside the State (4 percent of the value in West Virginia, Code 11-13-2; Code 11-13-2m) consumers in

Charleston, West Virginia, pay much more of taxes prescribed by the 1978 Act upon West Virginia-generated electricity than do consumers in Richmond, Virginia. This difference in the measure of the tax in terms of Section 391 and under the decision of this Court in Snead means that the tax burden on West Virginia domestic consumers of West Virginia-generated electric power is greater than the tax burden on out-of-State consumers of electricity produced in this State.

New Mexico's Electrical Energy Tax Act was limited to the single act of generating electricity. West Virginia's 1978 Act reaches beyond the single act of production to the sharing of the tax burden on or with respect to the generation or transmission of electric power in this State between our citizens and

out-of-State consumers. As the State's High Court ruled, the 1978 Act embraces the entire process. Thus, contrary to Petitioners' allegations, in arriving at a decision in the case at bar, it was unnecessary that the West Virginia Court consider the State's entire tax structure, and a fair reading of the majority and concurring opinions will establish that the Court's attention was focused entirely on the relevant statute, the 1978 Act.

Furthermore, this Court is not asked to consider the State's entire tax structure. It is quite clear that an examination of the 1978 Act will reveal to this Court, as it did to the West Virginia Supreme Court of Appeals, that the 1978 Act squarely meets the test prescribed by Section 391, viz: It has

not resulted, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

4. THERE IS NO CONFLICT BETWEEN THE 1978 ACT AS CONSTRUED BY THE WEST VIRGINIA SUPREME COURT OF APPEALS AND ARTICLE I, SECTION 8, CL. 3 (THE COMMERCE CLAUSE) OF THE CONSTITUTION OF THE UNITED STATES.

Petitioners maintain that Code 11-13-2, Code 11-13-2d, and Code 11-13-2m, the sections of the 1978 Act ruled by the West Virginia Supreme Court of Appeals to be on or with respect to the generation or transmission of electric power in this State, discriminate against interstate commerce in favor of intrastate commerce in violation of the Commerce Clause of the United States Constitution. (Petition, pp. 16, 17.)

In support of this allegation, Petitioners invoke the identical arguments which they advanced in their claim that the 1978 Act, as construed by the Court below, violates Section 391. Respondents submit that these contentions have been adequately disposed of in the preceding parts of this Brief and will not be belabored here.

Petitioners add the further argument that the rulings of the West Virginia High Court are irreconcilable with the decision of this Court in Armco Inc. v. Hardesty, ___ U.S. ___, 81 L. Ed. 2d 540, 104 S. Ct. 2620 (1984). (Petition, pp. 14, 15.)

Respondents submit that Armco is not apposite to the case at bar. The West Virginia statute involved in Armco was Code 11-13-2c, a section of the

Business and Occupation Tax statute prescribing the rate of tax to be paid on wholesale sales made within the State. Through the mechanism of Code 11-13-2, persons engaged in the manufacturing business within the State were relieved of the tax upon the local sale of their manufactured products which out-of-State manufacturers making wholesale sales in West Virginia of their products manufactured in other states, were required to pay. This Court pronounced the statutory exemption of local sales by in-State manufacturers discriminatory against out-of-State manufacturers making wholesale sales within this State in violation of the Commerce Clause.

The Armco decision does not apply to the facts of the case at bar for the reason that each of the Petitioners is

an in-State manufacturer of electric power subjected to the same tax burden measured precisely according to the business activities which each Petitioner conducts within West Virginia. See Appendix, Part B, pp. a30-a31:

> "Accordingly, West Virginia's business and occupation tax passes constitutional muster. The entire process of providing electricity to the ultimate consumer is taxed. If the whole process goes on in West Virginia, then West Virginia taxes manufacture, transmission and distribution. But if only manufacture occurs in West Virginia, West Virginia taxes only manufacture. Thus the tax is fairly apportioned and violates neither the Constitution of the United States or [sic] 15 USC § 391 (1976)." (Emphasis in original)

Respondents submit that the absence of discrimination in the tax treatment accorded manufacturers of electric power

in West Virginia by the 1978 Act assures full compliance with Commerce Clause strictures, hence Petitioners' reliance on the Armco decision is misplaced.

5. THE DECISION BELOW IS NOT RIPE FOR REVIEW BECAUSE IT IS NOT A FINAL JUDGMENT.

The trial court below agreed with Petitioners' claim that W. Va. Code 11-13-2m violated 15 U.S.C. § 391, and therefor did not address their additional claims that the State tax violated the Commerce and Equal Protection Clauses of the United States Constitution. When the West Virginia Supreme Court of Appeals reversed the trial court, it, too, failed to address the constitutional challenge, but remanded it back to the trial court, where it is now pending. While it is unnecessary to

predict whether the unresolved constitutional questions will eventually be presented to this Court, it is clear that granting the present petition for certiorari will require piecemeal litigation of Petitioners' various theories, any of which could be outcome-determinative.

Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1257(c), which provides for review of "final judgments or decrees" only. The opinion below does not satisfy traditional definitions of finality. It does not "terminate the litigation," as required by Mower v. Fletcher, 114 U.S. 127, 128, 29 L. Ed. 117, 5 S. Ct. 799 (1885). "Only one branch of the case has been finally disposed of below, therefore none of it is ripe for review." Collins

v. Miller, 252 U.S. 364, 371, 64 L. Ed. 616, 40 S. Ct. 37 (1920).

Most importantly, the decision below expressly leaves potentially dispositive federal questions for continued litigation. This Court has held that the mere potential that additional federal questions may arise subsequent to a state court's remand, precludes certiorari review:

> "This potentiality of additional federal questions arising out of the same controversy has led this Court to find want of the necessary finality of adjudicated constitutional issues in condemnation decrees before valuation has been made. Like considerations are relevant here." Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 72, 92 L. Ed. 1212, 68 S. Ct. 972 (1948).

In their Petition at pp. 8-9, Petitioners attempt to fit the opinion below into one of the expanded concepts of

finality expounded in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 43 L. Ed. 2d 328, 95 S. Ct. 1029 (1975). Petitioners fail to mention that the threshold requirement of Cox, that no substantial federal questions remain unresolved, is unmet in this case. In Cox, this Court identified four categories of cases which would be considered final in spite of unresolved proceedings still pending:

> "In most, if not all, of the cases in these categories, these additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date, and immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and of delayed justice' [citation omitted], as well as precipitate interference with state litigation. * * *" 420 U.S. at 477-478.

The instant Petition, at page 8, assures this Court that it will have a later opportunity to address the issues for which review is presently sought. That will insure that Petitioners get their "day in court." Nothing in the policies of finality embodied in Cox or its predecessors allows Petitioners two days in court. To so allow would unnecessarily congest this Court's docket, needlessly interfere with orderly State proceedings, and, should Respondents prevail, delay the ultimate resolution of the controversy below.

CONCLUSION

The Respondents respectfully submit that, for the foregoing reasons, the decision of the West Virginia Supreme Court of Appeals is, in all respects, manifestly correct, and the relief to

which they are entitled is that the Petition for a Writ of Certiorari to said Court be denied.

Respectfully submitted,

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APPENDIX

Chief Justice McHugh and Justice McGraw concur and reserve the right to file concurring opinions.

Justice Neely dissents and reserves the right to file a dissenting opinion.

NO. 16067

DUQUESNE LIGHT CO., ET AL.

V.

STATE TAX DEPT., ETC., ET AL.

Kanawha County

Reversed and Remanded

Miller, Justice

1. Section 2m of the 1978 Acts of the Legislature, Chapter 96, does not violate the provisions of 15 U.S.C. § 391, as interpreted by the United States Supreme Court in the case of Arizona Public Serv. Co. v. Snead, 441 U.S. 141, 60 L. Ed. 2d 106, 99 S. Ct. 1629 (1979).

2. "This Court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance." Syllabus Point 2, Sands v. Sec. Trust Co., 143 W. Va. 522, 102 S.E.2d 733 (1958).

Miller, Justice:

The State Tax Commissioner appeals a decision of the Circuit Court of Kanawha County which struck down our business and occupation tax on the generation of electric power, W. Va. Code, 11-13-2m.[1] The court below held that this case was controlled by Arizona Public Serv. Co. v. Snead, 441 U.S. 141,

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[1]The appellees are Duquesne Light Company, Ohio Power Company, West Penn Power Company, Appalachian Power Company, Monongahela Power Company, The Potomac Edison Company, and Virginia Electric and Power Company.

60 L. Ed. 2d 106, 99 S. Ct. 1629 (1979), in which the United States Supreme Court struck down a New Mexico utility tax because it violated Section 2121(a) of the Tax Reform Act of 1976, 15 U.S.C. § 391 (1976). We disagree and reverse.

I.

Before addressing the particular facts and issues raised in this case, it is important to understand the Snead case. The United States Supreme Court in Snead decided the case based upon 15 U.S.C. § 391,[2] which had been enacted

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[2] 15 U.S.C. § 391 provides:

"No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For purposes of this section, a tax is discriminatory if it results,

because of a discriminatory tax adopted by the State of New Mexico. The purpose of 15 U.S.C. § 391 was set out in the Senate Finance Committee Report, which the United States Supreme Court quoted:

> "'The committee has learned that one State places a discriminatory tax upon the production of electricity within its boundaries for consumption outside its boundaries. While the rate of the tax itself is identical for electricity that is ultimately consumed outside the State and electricity which is consumed inside the State, discrimination results because the State allows the amount of the tax to be credited against its gross receipts tax if the electricity is consumed within its boundaries.'" 441 U.S. at 147, 60 L. Ed. 2d at 111, 99 S. Ct. at 1632-33.

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either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce."

As the United States Supreme Court noted, the name of the state was not disclosed in the Committee Report, but during the floor debate, "Senators Domenici and Montoya of New Mexico, Senators Fannin and Goldwater of Arizona and Senator Cranston of California made it clear that the provision was aimed directly at New Mexico's electrical energy tax." 441 U.S. at 147, 60 L. Ed. 2d at 112, 99 S. Ct. at 1633. Thus, the Supreme Court had before it a legislative enactment directed at a state statute that Congress had declared to be discriminatory.

A critical part of the Court's opinion was its determination that it would not adopt the Commerce Clause Test for determining whether the state tax was discriminatory under 15 U.S.C.

§ 391. New Mexico urged this test since it "requires examination of New Mexico's total tax structure to determine whether the State in fact imposes a greater tax burden on electricity sent out of state. See Halliburton Oil Well Cementing Co. v. Reily, 373 US 64, 69." 441 U.S. at 149, 60 L. Ed. 2d at 113, 99 S. Ct. at 1633-34. New Mexico's central argument was that if the Court would examine the state's entire utility tax, it would be clear that the tax on utilities shipping energy out of state was not discriminatory.[3] However, the Court declined to

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[3]The United States Supreme Court summarized New Mexico's argument as follows:

"Power sold within New Mexico, they argue, is subject to a 4% tax: 2% from the electrical energy tax and 2% from the gross receipts tax. By contrast, New Mexico subjects electricity sent out

tax on utilities.[4] Prior to 1978, electric utilities generating or selling electricity in this State were taxed under W. Va. Code, 11-13-2d, at the rate of 5.72 percent based on sales and demand charges for domestic purposes and 4.29 percent on sales and demand charges for all other purposes.[5] Electric utilities generating electricity in this State but transmitting it out of state were taxed under the general manufacturing tax rate under W. Va. Code, 11-13-2b, which was 0.88 percent. See Virginia

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[4] See 1978 W. Va. Acts, Ch. 96.

[5] W. Va. Code, 11-13-2d, excepted "income received by municipally owned plants producing or purchasing electricity and distributing same." This exception for municipally owned electric utilities was continued in the 1978 amendments. W. Va. Code, 11-13-2d (1978).

Elec. and Power Co. v. Haden, 157 W. Va. 298, 200 S.E.2d 848 (1973), cert. denied, 416 U.S. 916, 40 L. Ed. 2d 118, 94 S. Ct. 1624 (1974).

As applicable to this case, the material changes made by the 1978 amendments to W. Va. Code, 11-13-1, et seq., were as follows: first, the taxation on manufacturing of electricity was removed from W. Va. Code, 11-13-2b, and placed in a new section, W. Va. Code, 11-13-2m. This section provides that the tax rate would be 4 percent, subject to a provision that the rate would be 2.46 percent on electricity sold to a customer engaged in manufacturing if the contract demand exceeded 200,000 kilowatts per hour per year, or

if the usage exceeded 200,000 kilowatts per hour in a year.[6]

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[6]W. Va. Code, 11-13-2m, provides:

"(1) Upon every person engaging or continuing within this State in the business of generating or producing electric power for sale, profit or commercial use, either directly or through the activity of others, in whole or in part, when the sale thereof is not subject to tax under section two-d [§ 11-13-2d] of this article, the amount of the tax to be equal to the value of the electric power, as shown by the gross proceeds derived from the sale thereof by the generator or producer of the same multiplied by a rate of four percent, except that the rate shall be two and forty-six hundredths percent on that portion of the gross proceeds derived from the sale of electric power to a plant location of a customer engaged in a manufacturing activity, if the contract demand at such plant location exceeds two hundred thousand kilowatts per hour per year, or if the usage at such plant location exceeds two hundred thousand kilowatts per hour in a year.

"(2) The measure of this tax shall be the value of all electric power generated or produced in this State for

The 1978 amendments also altered W. Va. Code, 11-13-2d, to provide that electric utilities generating electricity for sale in this State would be taxed at a 4 percent rate, and those which do not generate electricity but supply it are to be taxed at a 3 percent rate. A proviso similar to the one in Section 2m was placed in this section to provide for a reduced rate of 2.46 percent if a manufacturing customer's contract demand exceeded 200,000 kilowatts per hour per

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sale, profit or commercial use, regardless of the place of sale or the fact that transmission may be to points outside this State: Provided, that the gross income received by municipally owned plants generating or producing electricity shall not be subject to tax under this article."

year or if the usage exceeded 200,000 kilowatts per hour per year.[7]

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[7]The relevant portion of W. Va. Code, 11-13-2d, states:

"Upon any person engaging or continuing within this State in any public service or utility business . . . there is likewise hereby levied and shall be collected taxes on account of the business engaged in equal to gross income of the business multiplied by the respective rates as follows: . . . electric light and power companies, four percent on sales and demand charges for domestic purposes and commercial lighting and four percent on sales and demand charges for all other purposes . . . : Provided, that electric light and power companies which engage in the supplying of public service but which do not generate or produce electric power shall be taxed on the gross income derived therefrom at the rate of three percent on sales and demand charges for domestic purposes and commercial lighting and three percent on sales and demand charges for all other purposes . . . : Provided, however, that the sale of electric power under this section shall be taxed at the rate of two and forty-six hundredths percent on that portion of the gross proceeds derived from the sale of electric power to a plant location of a customer engaged in a

It is quite clear that the 1978 amendments harmonized the tax rate between the generation and sale in this State of electric power and the generation of electric power in this State for transmission out of state. It is true that there is some difference in language between Sections 2d and 2m with regard to measuring the value of the

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manufacturing activity, if the contract demand at such plant location exceeds two hundred thousand kilowatts per hour per year, or if the usage at such plant location exceeds two hundred thousand kilowatts per hour in a year . . . . The measure of this tax shall not include gross income derived from commerce between this State and other states of the United States or between this State and foreign countries. The measure of the tax under this section shall include only gross income received from the supplying of public services. The gross income of the taxpayer from any other activity shall be included in the measure of the tax imposed upon the appropriate section or sections of this article."

product, i.e., electric power.[8] However, W. Va. Code, 11-13-2, was also amended in 1978 to bring equality to the measurement of the value between Sections 2d and 2m taxes:

> "If any person liable for any tax under sections two-a, two-l or two-m [§§ 11-13-2a, 11-13-2l or 11-13-2m] shall ship or transport his products or any part thereof out of the state without making sale of such products, the value of the products in the condition or form in which they exist immediately before transportation out of the state shall be the basis for the assessment of the tax imposed in said section, except in those instances in which another measure of the tax is expressly provided. The tax commissioner shall prescribe equitable and

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[8] W. Va. Code, 11-13-2d, uses the term "gross income" from "sales and demand charges"; and W. Va. Code, 11-13-2m, uses the term "gross proceeds derived from the sale thereof."

uniform rules for ascertaining such value."[9]

III.

With this background in mind, we address the issue in this case: does W. Va. Code, 11-13-2m, violate 15 U.S.C. § 391? The circuit court did not elaborate on its holding. The principal

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[9]The parties agree that the State Tax Commissioner has by a written memorandum with the appellees adopted a uniform formula for ascertaining the value of electricity under Section 2m, which is known as the VEPCO formula. Under this formula, value is essentially the cost of generation at the place of manufacture plus an allowed rate of return. (Appellees' brief, p. 6-7) The Tax Commissioner argues, and we agree, that with the tax rates being the same, this valuation or measurement yields a lower tax on electric power transmitted out of state, because the measurement of value for electricity generated and sold in this State includes not only the cost of manufacturing and a reasonable rate of return, but the cost of transporting it to the customer (poles, lines, transformers, etc.) as well.

argument advanced by the utilities is that Section 2m must be read in isolation. When it is, it is patently discriminatory under Snead because it taxes only the manufacturing of electricity which is transmitted out of state, and excludes in-state manufacturing by its reference to Section 2d.

We are cited several cases in which we have held that our business and occupation tax is composed of a number of separate taxes which are applicable to various distinct business activities. E.g., Virginia Elec. and Power Co. v. Haden, supra; United Fuel Gas Co. v. Battle, 153 W. Va. 222, 167 S.E.2d 890, appeal dismissed sub nom. United Fuel Gas Co. v. Haden, 396 U.S. 116, 24 L. Ed. 2d 309, 90 S. Ct. 398 (1969); Owens-Illinois Glass Co. v. Battle, 151

W. Va. 655, 154 S.E.2d 854 (1967). Based upon these cases, the argument is made that each section of the business and occupation tax must stand scrutiny separately.

We have not, however, adopted such a rigid view of our business and occupation tax structure. For example, in Owens-Illinois Glass Co. v. Battle, we utilized the doctrine of in pari materia to settle a question under our business and occupation tax by construing several related provisions.

Moreover, we cannot ignore the fact that the 1978 amendments did more than enact Section 2m. As we have previously stated, several sections of the business and occupation tax which dealt with the manufacturing of electricity were amended. Under well known canons of

statutory construction, we are obliged to consider a legislative enactment in its entirety. Woodring v. Whyte, ___ W. Va. ___, 242 S.E.2d 238 (1978); Spencer v. Yearce, 155 W. Va. 54, 180 S.E.2d 868 (1971); Syllabus Point 1, State ex rel. Holbert v. Robinson, 134 W. Va. 524, 59 S.E.2d 884 (1950).

If we consider the 1978 amendments in their entirety, it is apparent that the legislature did not single out and tax only the manufacturing of electricity that is transmitted out of state. Under Section 2d, the manufacturing of electricity that is used in this State is also taxed at the same rate.

Our situation is entirely different from what existed in Snead where New Mexico had enacted a single tax statute directed at manufacturing electricity

which was transmitted out of state. As noted in our analysis of the Snead decision, the Court refused to go beyond the confines of the statute to determine from the total framework of New Mexico's tax scheme if the particular tax was in fact discriminatory.

In the present case, the 1978 amendments embody both Sections 2d and 2m. It is clear that both sections tax the business of generating electric power at the same rates. It is also clear that Section 2d deals with in-state generation and sale while Section 2m relates only to in-state generation or manufacture which is transmitted out of state. We find no discrimination between Sections 2d and 2m.

The fundamental fallacy of the appellees' argument is that they would

have us limit our analysis to Section 2m, as if the legislative amendments in 1978 involved only this section.[10] We cannot, however, ignore the other sections contained in the 1978 amendments dealing with the manufacture of electrical power.[11]

Consequently, we hold that Section 2m of the 1978 Acts of the Legislature, Chapter 96, does not violate the provisions of 15 U.S.C. § 391, as interpreted by the United States Supreme Court in the case of Arizona Public Serv. Co. v. Snead, 441 U.S. 141, 60 L. Ed. 2d 106,

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[10]This was also the mistake in the student analysis on which the trial court relied in part. See Note, West Virginia's Generation of Electricity Tax: Is It Valid After Snead?, 83 W. Va. L. Rev. 79 (1981).

[11]See, i.e., W. Va. Code, 11-13-2, -2b, -2d and -2m.

99 S. Ct. 1629 (1979), and the Circuit Court of Kanawha County erred in holding that it did.

IV.

Although both parties have briefed the question of whether the statute violates the Commerce and Equal Protection Clauses of the United States Constitution, as well as the Equal and Uniform Taxation Provision of the West Virginia Constitution, we decline to address these issues because they were not passed upon by the circuit court. We have traditionally held, as indicated in Syllabus Point 2 of Sands v. Sec. Trust Co., 143 W. Va. 522, 102 S.E.2d 733 (1958), that:

> "This Court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance."

See also West Virginia Dept. of Highways v. Delta Concrete Co., ___ W. Va. ___, 268 S.E.2d 124 (1980); Dixon v. American Indus. Leasing Co., 157 W. Va. 735, 205 S.E.2d 4 (1974); Syllabus Point 1, Pettry v. Chesapeake and Ohio Ry. Co., 148 W. Va. 443, 135 S.E.2d 729 (1964).

Because we have found the circuit court in error in its application of Snead, we reverse the judgment and remand the case in order that it may consider the other grounds asserted by the appellees in their complaint.

Reversed and Remanded.

NO. 16067 - DUQUESNE LIGHT CO., ET AL V. STATE TAX DEPT., ETC., ET AL.

Neely, Justice, concurring:[1]

I concur to mention some additional distinctions between our business and occupation tax structure and the electrical energy tax that was held invalid in Arizona Public Service Co. v. Snead, 441 U.S. 141 (1979). Under the taxing scheme enacted by the State of New Mexico, a producer of electricity in New

[1]Originally I noted a possible dissent in this case because it appeared that the West Virginia situation was controlled by Arizona Public Service v. Snead, infra. But as I methodically worked through the New Mexico and West Virginia tax schemes, my dissent became a concurrence. I now agree with the majority's opinion and add this concurrence only to explain my own reasoning in the hope that I might save work for others.

Mexico who sold the electricity out-of-state paid a 2 percent tax that would not have been collected if the electricity had been sold in New Mexico. In effect, then, New Mexico taxes separately the production of electric power for export.

Under New Mexico law distributors of electrical energy were liable to payment of a gross receipts tax of 4 percent.[2] This tax, enacted in 1953, was not related to electricity generation; the utility would have paid the same 4 percent if it had been a door-to-door distributor of bubble gum.[3]

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[2]NMSA 7-9-1 to 7-9-81 [1978] sets out New Mexico's general excise tax.

[3]The tax imposed on the New Mexico electric utilities was a general excise tax that applied in equal measure to all other businesses within the State. That

When the New Mexico electrical energy tax[4] was imposed, the statute gave credit for the electrical energy tax against the New Mexico gross receipts tax--a credit that could be used only by in-state, New Mexico producers/distributors. Thus, although New Mexico was entitled to tax the production of electrical energy, it failed to tax both the domestic and foreign producers equally because New Mexico, in effect, refunded the tax to domestic producers

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section, NMSA 7-9-4 [1983], in its present incarnation reads: "A. For the privilege of engaging in business, an excise tax equal to three and three-fourths percent of gross receipts is imposed on any person engaging in business in New Mexico. B. The tax imposed by this section shall be referred to as the 'gross receipts tax.'"

[4]NMSA 7-18-1 to 7-18-6 [1978]. New Mexico's electrical energy tax, repealed in 1982, related to the imposition and

through a tax credit that applied to an entirely unrelated tax. That is the difference between pre-Snead New Mexico and today's West Virginia. What if New Mexico had given compensating credits against domestic producers' turnpike tolls or had given them a credit toward the New Mexico vehicle licenses of power company trucks? These examples make clear that the electrical energy tax and its compensating credit for in-state producers explicitedly [sic] discriminated against interstate commerce.

West Virginia does not refund the electricity generation tax to domestic producers; West Virginia taxes domestic

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rate of tax on the generation of electricity and required reports or remittances of persons subject to the tax.

producers more heavily because they do more in West Virginia. But at first blush West Virginia's scheme appears similar to New Mexico's scheme because we have one subsection of the West Virginia Code that applies to foreign producers and another that applies to domestic producers. Our tax for both domestic and foreign producers, however, is calculated on exactly the same basis, namely on the value of electricity manufactured, transmitted, and distributed.

The structure of W. Va. Code, 11-13-2d [1978] and 11-13-2m [1978] discloses that West Virginia taxes all the electrical utilities equally along a continuum that starts with manufacture of the power and ends with its delivery to the consumer. New Mexico's tax was

levied only upon electricity manufactured; the credit, however, was against gross domestic sales. In evaluating the applicability of Snead, supra, to the West Virginia business and occupation tax it is important to point out that the New Mexico tax gave credit for one type of tax--an electrical energy tax--against another type of tax, namely a sales tax.

In state statutes that affect interstate commerce, words of art or characterizations can be more significant than in almost any other area of law. Phrases such as "privilege of doing business" or "general excise" can made or break a state statute. The Supreme Court has held that such "magic words or labels" cannot validate an otherwise invalid tax, but may be

capable of disabling "an otherwise constitutional levy." Railway Express Agency v. Virginia, 358 U.S. 434, at 441 (1959).

Under the Supreme Court's recent view of state taxation of interstate commerce, a state tax on the "privilege of doing business" is not per se unconstitutional in the absence of a claim "that the activity is not sufficiently connected to the State to justify a tax, or that the tax is not fairly related to benefits provided the taxpayers, or that the tax discriminates against interstate commerce, or that the tax is not fairly apportioned." Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, at 287 (1977), reh. den. 430 U.S. 976 (1977). Accordingly, West Virginia's business and occupation tax passes constitutional

muster. The entire process of providing electricity to the ultimate consumer is taxed. If the whole process goes on in West Virginia, then West Virginia taxes manufacture, transmission, and distribution. But if only manufacture occurs in West Virginia, West Virginia taxes only manufacture. Thus the tax is fairly apportioned and violates neither the Constitution of the United States or 15 U.S.C. § 391 (1976).

In order to understand the legality, under Snead, supra, of West Virginia's business and occupation tax structure as applied to out-of-state utilities one must look for a moment at the nature of the electric utility business. Approximately 90.8 percent of the value of electrical energy at the point of consumption is attributable to the cost

of manufacture. For example, if we study the 1983 Annual Report of the Appalachian Power Company we find that its production of power (manufacture) expenses were $495,741,691 while its bulk transmission costs were only $15,981,809 and its cost of low voltage distribution to consumers was only $41,147,842. Consequently, the biggest overall activity in the electric utility business is manufacture.

The only reason that West Virginia taxes generation of power for out-of-state consumption under W. Va. Code, 11-13-2m [1978] and generation for in-state consumption under W. Va. Code, 11-13-2d [1978] is so that out-of-state producers will not pay tax on the value of transmission and distribution activities. The tax for in-state consumption

is higher than the tax on out-of-state consumption because West Virginia also taxes transmission and distribution for in-state producers. Under the West Virginia business and occupation tax statutes everything that an electric utility does in the State of West Virginia--whether a foreign or domestic producer--is taxed at 4 percent. Manufacturers of electrical energy for sale inside West Virginia are treated exactly as manufacturers of electrical energy for sale outside of West Virginia.

For our purposes here it is important to point out that West Virginia makes no effort to exempt in-state producers and distributors from the burden of the tax on electrical energy production. This lack of discrimination is made possible because West Virginia

has always had a business and occupation tax on the public utility business. New Mexico ran afoul of 15 U.S.C. § 391 (1976) because, for all intents and purposes, New Mexico taxed out-of-state producers on the basis of generation and in-state producers on the basis of gross receipts (sales). Since New Mexico relied upon a gross receipts (sales) tax to raise revenue from producers of electricity in New Mexico it had no choice but to enact a subsequent special electrical energy tax to capture revenue from utilities generating power in New Mexico to be sold outside of New Mexico. Without New Mexico's 2 percent tax credit against the gross receipts tax, New Mexico consumers would have had their rates increased by 2 percent.

What New Mexico did was entirely logical, but also probably unconstitutional; at least we know that it was against the subsequently enacted 15 U.S.C. § 391 (1976). In New Mexico's case the substance of the tax was reasonable but the form was unconstitutional. The Supreme Court's overruling of Specter Motor Service v. O'Connor, 340 U.S. 602 (1951) in Complete Auto Transit Inc. v. Brady, supra, implies that triumphs of form over substance are no longer fashionable in determining whether a tax is a burden on interstate commerce. At some point, however, form becomes substance: it is a fine line, but is was crossed by New Mexico. Under Complete Auto, supra, West Virginia is on the constitutional side of the line

as well as being within 15 U.S.C. § 391 (1976).

It may appear initially that the distinction between New Mexico's 2 percent credit for the electrical energy tax against the New Mexico gross receipts tax *versus* West Virginia's exemption from the operation of *W. Va. Code*, 11-13-2m [1978] for local utilities paying tax under *W. Va. Code*, 11-13-2d [1978] is a distinction without a difference. But nothing could be father [*sic*] from the truth: there is a difference and that difference relates to the fact that West Virginia producers and distributors of electricity are not exempt from the burden of *W. Va. Code*, 11-13-2m [1978] but, rather, are subjected to exactly the same burden plus the *additional* tax on transmission and

distribution provided in W. Va. Code, 11-13-2d [1978]. If, indeed, we had imposed a special tax on the generation of electric power and then given West Virginia producers/distributors of power a credit against an entirely unrelated sales tax we would be within the purview of Arizona Public Service Co. v. Snead, supra. But we didn't!